

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6572

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

BLAKE KELLER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CR-01-135)

Submitted: May 31, 2006

Decided: June 20, 2006

Before MICHAEL, MOTZ, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Frank W. Dunham, Jr., Federal Public Defender, Jeremy C. Kamens, Assistant Federal Public Defender, Alexandria, Virginia, for Appellant. Paul J. McNulty, United States Attorney, John Eisinger, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Blake Keller appeals the district court's denial of his motion to reconsider its order granting the Government's motion to withdraw its conditional Fed. R. Crim. P. 35(b) motion. For the following reasons, we affirm.

It is well-settled that whether to file a 35(b) motion is a matter left to the government's discretion. See Fed. R. Crim. P. 35(b); see also United States v. Dixon, 998 F.2d 228, 230 (4th Cir. 1993). However, a court may grant a downward departure in the absence of a government motion if: (1) the government has obligated itself in the plea agreement to move for a departure or (2) the government's refusal to move for a departure was based on an unconstitutional motive. See Wade v. United States, 504 U.S. 181, 186 (1992). We find neither circumstance present here and thus conclude the Government retained absolute discretion as to whether to pursue a Rule 35(b) motion.

Accordingly, we affirm the district court's order granting the Government's motion to withdraw its previously filed conditional Rule 35(b) motion and the order denying Keller's motion for reconsideration for the reasons stated by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED